INDEX

	PAGE
Statement	1
The Compass (*Napier*) Claims and the Application to Patent Them	3
The Oyler (*Brown*) Claims and the Application to Patent Them	5
Rejection of the Patent Applications	8
Summary of Argument	11
Argument	13
I. The *Union Oil* proceeding cannot sustain a decision in the Government's favor since it purported to invalidate valuable property rights on the basis of controverted propositions of fact and of law without affording notice and an opportunity for hearing, thereby offending Due Process, the Administrative Procedure Act, and Interior's own regulations	13
II. The proceedings in the lower courts provide adequate and appropriate bases for a ruling in the oil shale claimants' favor	18
Conclusion	21

Citations

Cases:

Adams v. *Witmer*, 271 F.2d 29 (9th Cir. 1958)	16
Best v. *Humboldt Mining Co.*, 371 U.S. 334	15
Columbia Research Corp. v. *Schaffer*, 256 F.2d 677 (2d Cir. 1958) *vacated on other grounds*, 256 F.2d at 680-681	17

PAGE

Costello v. *United States*, 365 U.S. 265 19

Crowell v. *Benson*, 285 U.S. 22 15

Gardner v. *Panama R. Co.*, 342 U.S. 29 19

Gonzales v. *United States*, 348 U.S. 407 15

Gutierrez v. *Waterman S.S. Corp.*, 373 U.S. 206 ... 19

Holmberg v. *Armbrecht, et al.*, 327 U.S. 392 19

Ickes v. *Virginia-Colorado Development Corp.*, 295 U.S. 639 .....9, 14, 17, 20

Interstate Commerce Commission v. *Louisville & Nashville R.R.*, 227 U.S. 88 15

Kosty v. *Lewis*, 319 F.2d 744 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 19

Morgan v. *United States*, 304 U.S. 1 15

Morgan v. *United States*, 298 U.S. 468 15

Ohio Bell Telephone Co. v. *Public Util. Comm'n*, 301 U.S. 292 15

Powell v. *Zuckert*, 366 F.2d 634 (D.C. Cir. 1966) .. 19

Republic Aviation Corp. v. *NLRB*, 324 U.S. 793 ... 15

Securities Comm'n v. *Chenery Corp.*, 318 U.S. 80 .. 18

TransWorld Airlines v. *CAB*, 254 F.2d 90 (D.C. Cir. 1958) 17

United States v. *Morton Salt Co.*, 338 U.S. 632 16

Wilbur v. *Krushnic*, 280 U.S. 306 ..... 7, 13

Wong Yang Sung v. *McGrath*, 339 U.S. 33 17

INTERIOR DECISIONS:

Union Oil Company of California, et al., 71 I.D. 169 .....2, 3, 13-14, 16, 17, 19-21

United States v. *O'Leary*, 63 I.D. 341 16

PAGE

STATUTES:

Act of May 10, 1872, 17 Stat. 92 as amended, 30 U.S.C.A. 28 13

MISCELLANEOUS:

Code of Federal Regulations

43 C.F.R. 3450 13

43 C.F.R. 3452 16

43 C.F.R. 3470 13

2 Davis, *Administrative Law* 236, n. 2 (1958 ed.) .. 17

IN THE

Supreme Court of the United States

No. 221

October Term, 1969

WALTER J. HICKEL, Secretary of the Interior,
Petitioner,

v.

BARNETTE T. NAPIER, GRACE A. SAVAGE, JOAN L. SAVAGE, MAUDE B. FARNUM, ST. CLAIR NAPIER CATLIN, WILLIAM H. FARNUM, JR., JOHN R. FARNUM, JOHN W. SAVAGE, and NEIL S. MINCER,
Respondents,

WALTER J. HICKEL, Secretary of the Interior,
Petitioner,

v.

PENELOPE CHASE BROWN, Individually and as Trustee, and THE OIL SHALE CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Statement

This brief is submitted on behalf of the captioned respondents who were the plaintiffs in two of the four

actions that were covered by the opinions below. These two actions may for convenience be referred to as the *Napier* and *Brown* cases. A separate brief is being submitted on behalf of the respondents The Oil Shale Corporation, *et al.*, in the first of the four actions to have been filed in the District Court (which for convenience may be referred to as the *TOSCO* case). That brief treats several basic matters common to all four actions; this brief adopts that treatment of those matters.[1]

The *TOSCO* case differs from the other three actions principally in that it seeks only direct judicial review of certain administrative proceedings in the Department of the Interior that occurred in the latter 1920's and early 1930's involving allegations that annual assessment work was in default.[2] The other three actions, which likewise seek direct judicial review of similar proceedings in the same period, also attack administrative proceedings in the Department of the Interior in the 1960's which, on the basis of the assessment work proceedings, rejected applications to patent certain oil shale placer mining claims. These latter proceedings culminated in *Union Oil Company of California, et al.*, 71 I.D. 169 (1964), and for convenience will be referred to in this brief simply as the "*Union Oil* proceedings". No patent application has been made for the oil shale claims in the *TOSCO* case, and those claims were not involved in the *Union Oil* proceedings.

This brief focuses upon the *Union Oil* proceedings, particularly insofar as they rejected the patent applications for the respondents' oil shale claims, three of the

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[1] The respondents in the fourth action, Umpleby *et al.*, are filing a separate brief in this Court.

[2] The *Tosco* case also differs from the other three in that it involves assessment work proceedings in which personal jurisdiction was largely lacking.

so-called "Compass" claims[3] owned by Barnette T. Napier, *et al.*, and the so-called Oyler claims Nos. 1-4, owned by Penelope Chase Brown (under lease to The Oil Shale Corporation).

The Compass (*Napier*) Claims and the Application To Patent Them.

The patent application for the Compass claims was filed on June 1, 1959, in the Colorado State Office, Bureau of Land Management. Title and other formal aspects of review of the application by the Land Office indicated that all was in order, and the claim owners were called upon to pay the purchase price, which they did on October 30, 1959.[4] Three Mineral Examiners of the Land Office conducted field investigations of the claims in October and November 1959. In a report dated January 27, 1960, they concluded that the claims were valid and eligible for patent, with the exception of a portion of one of the claims that was non-mineral (and thus not subject to patent under the mining laws), which the claims owners subsequently relinquished.[5]

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[3] The Northeast, Northwest, and Southeast Oil Shale Placer Mining Claims. The fourth "Compass" claim, the Southwest, was never declared invalid for assessment work default, and accordingly *Union Oil* did not reject the patent application as to that claim.

[4] Printed Appendix in this Court (hereinafter "A.") pp. 394, 401 (allegations in paragraph 7 of the Complaint, admitted in the Answer).

[5] Pl. Exs. 155, 216; R. 1964-71, 2105. Each of the four cases below is represented by a separate record. However, at the trial the evidence common to the four cases was entered only in the record of the *Tosco* case and thus is to be found in the record of No. 9581 in the court of appeals. References herein to the record ("R.") are to the record in No. 9581.

Plaintiffs' Exhibits 1-307 were all received in evidence together at R. 863, and subsequent citations of this reference will be omitted to avoid repetition.

The Mineral Examiners also reviewed the Land Office's records of prior investigations of, and proceedings with respect to, the Compass claims. Their report noted that the claims had been contested, and declared invalid in 1931, for default in performance of assessment work. Pl. Ex. 155; R. 1966-67. Their conclusion that the claims were nonetheless eligible for patent undoubtedly reflected their understanding, elsewhere specifically expressed, that the assessment work decisions "did not affect the status of the claims." See, *e.g.*, Pl. Exs. 128, 129; A. 175-177.

The Mineral Examiners' report also listed the eight original locators of the Compass claims, residents in the oil shale area. Pl. Ex. 155, R. 1966. Their interests have devolved upon the respondents herein as follows. Locator B. T. Napier died in 1920, and his interest has passed by inheritance to his descendants, respondents Barnette T. Napier and St. Clair Napier Catlin. Locator Robert Eaton willed his interest to his daughters in 1952, who in 1957 sold it to respondents William H. and John R. Farnum, the sons of the third of the original locators, W. H. Farnum. W. H. Farnum in 1955 deeded his interest to his wife, respondent Maude B. Farnum. The fourth locator, J. L. Armstrong, deeded his interest to his wife in 1925 and in 1953 she sold to respondents, John and Joan Savage, who had the year before purchased from locator Luther Armstrong his interest in the claims. The interest of the sixth locator, Hiram Smith, has passed by deed to John and William Farnum. The last two locators, Morgan McCann and Mark Love, died before 1931, apparently without any surviving relatives. Their interests passed to those respondents who are descendants of the locators in the 1950's when they performed work on the claims, and by statutorily authorized publication and otherwise, called upon any successors in interest to McCann and Love to contribute their share of the expenses of the work, and they failed to do so. Finally, respondent Neil Mincer received an

interest in the claims from the other owners in return for legal services rendered.[6]

Assessment work was performed on the Compass claims each year from 1920 through the assessment work year which ended June 30, 1930.[7] Whether the work was done the next year was disputed and in the old contest it was decided that sufficient work had been done for one of the Compass claims but not for the other three.[8]

The Oyler (*Brown*) Claims and the Application To Patent Them

The patent application for the four Oyler claims was filed on September 30, 1955, also in the Colorado State Office. Pl. Ex. 250; R. 2267. Field investigation of these claims was then made by a veteran Mineral Examiner, Warren Sholes, who had also examined the claims in the latter 1920's and early 1930's when the Land Office was determining the validity of all oil shale claims (Pl. Ex. 125; A. 166). His February 12, 1957, report (Pl. Ex. 125; A. 166-174) on the Oyler patent application noted two technical defects (which were to be cured over the next few years, Pl. Exs. 255, 256; A. 259-260), and otherwise indicated that the claims were eligible for patent. He attached to this report his prior report (Pl. Ex. 242; R. 2213-52) of February 28, 1929, which had found the claims valid in all respects with the possible exception of assessment work. The 1929 report had itself referred to an earlier report (Pl. Ex. 229; A. 243-49) of still another investigation that had been made of the claims in 1918.

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[6] The abstract of title showing the devolution of ownership of the Compass claims appears in the Compass patent application, Def. Ex. D; R. 6610-6761, 882.

[7] The abstract of title, note 6 above, contains documents evidencing performance of the work through these years.

[8] Pl. Ex. 155; R. 1966-67. Service of process was not effected against locators McCann and Love or their successors in interest.

The 1918 report had been made in the course of investigation at that time of oil shale claims which, like the Oyler claims, were within the 1916 Naval Oil Shale Reserve and, because they antedated the establishment of the Reserve, would if valid reduce its size. This report indicated that a thorough investigation had been made, including interviews of the locators, and concluded that the claims were valid. The report also indicated that "it was well known that bona fide oil shale placer locations existed within the confines of this reserve at the time it was created. . . ." A. 247.[9]

Mineral Examiner Sholes' 1929 report noted that in 1920 the Oyler claims had been purchased by the Index Shale Oil Company (Pl. Ex. 242; R. 2219). Index was founded and controlled by Harry Brown, whose widow, respondent Penelope Chase Brown, still owns the Oyler claims.

The Browns were originally from New Jersey, where Harry Brown had a flourishing business. Around 1920 he was lured by the challenge of bringing the nation's vast oil shale reserves into commercial production, and over the next fifteen years he devoted all of his energies and financial resources, including the proceeds of a mortgage loan on the family residence in New Jersey, to the operations of Index. Index held two groups of oil shale claims, the four Oylers, and a group of seventeen other claims that came to be known as the "Index" claims. Index did not apply for patents on the claims [10] but concentrated its re-

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[9] Indeed, in establishing the Naval Oil Shale Reserves in 1916, more than twice the oil shale reserves the Navy had requested was set aside, "in order to safeguard against the reduction of the reserves through the existence of valid claims not of record in the Department of the Interior" (Pl. Ex. 222; R. 2126-29).

[10] The "Index" claims (Sulphur Spring, Mt. Blaine, *et al.*) were patented to a successor in interest in 1959 (Pl. Ex. 95; A. 152).

sources upon research and development. These activities led around 1923 to the opening of an oil shale mine and the construction of a production complex on the Index claims, which was operated until around 1928. Research continued for some years thereafter, and the Browns continued to live there on the claims until 1936. During these years Index resisted separate assessment work contests against the "Index" group of claims and the Oyler claims. *E.g.*, Pl. Ex. 40; A. 89.

Index performed assessment work on the Oyler claims for each year through June 30, 1930. As Mineral Examiner Sholes' 1929 report confirmed, more than $5,000 worth of work was done in the 1921-1928 assessment work years alone (Pl. Ex. 242; A. 251-252). It was arguable, however, whether in particular years $100 worth of work was properly allocable to each claim (Pl. Ex. 242; R. 2213, 2249-51), and in 1929 a complaint was filed (Contest 12039) charging that sufficient assessment work had not been done "each and every year since the date of the Leasing Act" (Pl. Ex. 244; R. 2255).[11] Before a hearing was held in Contest 12039 this Court announced its ruling in *Wilbur* v. *Krushnic*, 280 U.S. 306, and Interior decided that the 1929 charge would be "ineffective", and directed a further field examination (Pl. Exs. 37, 38; A. 86-88). The field investigation indicated that sufficient work had been done for the years 1929 and 1930, but not for the year ending June 30, 1931, and the Oyler claims were promptly attacked in a renewed complaint for that default (Pl. Exs. 40, 41; A. 88-91). Index, through Harry Brown, admitted that it had not performed sufficient assessment work on the Oylers in the year that ended June 30, 1931, but challenged the Land Office's jurisdiction in the premises (Pl. Exs. 40, 41; A. 88-91). This challenge the Commissioner in 1931 and the Secretary in

[11] The Oyler contest and claims thus are quite similar to the circumstances of the *Krushnic* case, as the Government's brief describes them (p. 14).

1932 rejected, declaring the claims invalid. *Ibid.* The Secretary later agreed in 1935, however, that the challenge to his jurisdiction had been well founded. At the conclusion of the assessment work contest against the Oyler claims, Under Secretary Charles West wrote to the Secretary of the Navy, on October 31, 1935, that the 1931 and 1932 declarations of invalidity were "without effect and void" (Pl. Exs. 176, 177; A. 195-197).

While the Navy Department and the Interior Department each was thus aware of the Oyler claims and of Index' defense and maintenance of them, and each understood the claims to have been unaffected by the 1931-1932 declarations of invalidity, they proceeded, toward the close of World War II and in the exigencies of a national emergency, to construct and operate an oil shale mine and demonstration plant a short distance from the Oyler claims, and to locate a water storage facility on one of the Oyler claims. While those operations were underway the officials involved were clearly advised by Index of its continuing rights in the Oyler claims (Pl. Ex. 248; A. 254-255). The operations were, however, completed without any interference on Index' part.

Rejection of the Patent Applications

Application for patent for the Oyler claims was, as noted, filed on September 30, 1955. While the technical defects in the patent application were being remedied, local officials of the Land Office raised with their superiors in Washington the possibility of utilizing the old assessment work decisions to defeat the Oyler claims, among others (Pl. Exs. 212-214; A. 237-38; R. 2099-2102). This possibility was unequivocally rejected in a December 3, 1959, memorandum by Associate Solicitor Clarence Bradshaw (a career official who had himself been active in the

old assessment work proceedings (see Pl. Ex. 283; R. 4581-82)), for the reason that in view of this Court's ruling in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, the Department had,

> "in its decision of June 24, 1935, in the *Shale Oil Company* case (55 I.D. 287) held that in that case the Commissioner's decision was without authority of law and void; . . . and overruled 'other departmental decisions in conflict with this decision'. Thus in effect the decision of June 24, 1935, recalled and vacated *all* departmental decisions declaring oil shale placer claims null and void solely for failure of the claim owner to do the assessment work, thus leaving the claims as if they never had been contested." (Pl. Ex. 215; A. 238-39; Emphasis in original, see R.2103)

Early in 1961 local officials processing the Oyler patent application concluded that patent should issue shortly, because apart from the technical defects being cured "all aspects concerning the validity of the subject claims have been complied with" (Pl. Ex. 255; A.259-260) and because "We have investigated the application as to abandonment, dummy locators, and lack of good faith, and find that there is no basis for rejecting the application on any of these grounds" (Pl. Ex. 254; A.258).

During the middle of 1961, however, inquiry was again directed to higher officials in Washington concerning the possibilities of rejecting pending oil shale patent applications by reason of the old assessment work decisions (Pl. Exs. 157, 217; A.193-194, 240-241). By telegram of September 22, 1961, a new Associate Solicitor (Clarence Bradshaw having retired) "authorized" local officials to reject pending applications on that ground wherever possible, cautioning them that "care should be exercised" to assure that the old contests had been procedurally proper so that the rejection of the patent applications "may be reasonably free from successful challenge" (Pl. Ex. 218; A.241).

By a decision dated February 16, 1962 (Def. Ex. B; A.266-268), local officials rejected the Oyler application referring to the old assessment work decision and to "the principles of finality of administrative action, estoppel by adjudication, and res judicata. . . ." The decision also announced falsely that "the contestee and its purported successors in interest have acquiesced in the Commissioner's decision for more than 29 years."

Virtually identical decisions[12] were rendered at the same time as to the Compass application, and as to all other pending oil shale patent applications wherever there had been a prior declaration of invalidity for default in performance of assessment work.

Prior to the February 16, 1962 decisions, the Department gave no notice, warning, or opportunity to be heard, to the oil shale patent applicants (Pl. Ex. 314; A. 311-312, Answer to Interrogatory 41). Those decisions recited that they would become final unless "appeals" were prosecuted within 30 days to the Director of the Bureau of Land Management.[13] Such appeals were duly perfected within the time allowed.

On appeal, the oil shale claim owners argued, among other things, that their claims could not properly be declared invalid in the absence of notice of the charges thought

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[12] Although these form decisions asserted generally that during the alleged acquiescence "the rights of others, including the United States, have intervened", the facts are that, because the Oyler claims are within the Naval Reserve, no part of them has ever been open for oil and gas leasing, for homesteading under the surface-homestead laws, or for any other public land law use, except for the granting of a succession of one-year grazing privileges.

[13] On May 8, 1962, the appeals were taken from the Director and assigned for decision to the Office of the Solicitor, which had "authorized" the decision being appealed. See A.352. The claim owners were not notified of this and thus continued to direct their papers on appeal to the Director.

to invalidate their claims, and in the absence of an opportunity to present evidence bearing upon those charges. They argued that such notice and opportunity to be heard were required by due process, the Administrative Procedure Act, and the Department's own regulations. Focusing upon these contentions, the oil shale claim owners filed, in the spring of 1963, similar motions for a remand of the proceedings to the local level so that a hearing could be held (Def. Ex. B; A. 263-266; Def. Ex. D; A. 315-326). To these motions were attached comprehensive offers of proof (*ibid.*) covering a variety of factual matters subsequent to the old assessment work decisions upon which the Department had purported to rule implicitly or expressly, in the February 1962 decisions—matters such as (1) whether in 1935 the Department had itself rendered all the prior assessment work decisions ineffective, (2) whether and to to what extent the Department had subsequently treated those decisions as ineffective, and (3) whether the Government or any private party had regarded those decisions as effective and had acted in reliance upon such a view.

In 1964 the Solicitor's Office rejected the motions for a hearing and the offers of proof and rejected the subject patent applications. A. 352-386. The present actions followed shortly.

SUMMARY OF ARGUMENT

The *Union Oil* proceedings of 1961-1964 purported to invalidate respondents' valuable property rights in oil shale mining claims. Starting from the premise that certain decisions in 1931-1932 (purporting to invalidate the claims for default in performance of annual assessment work) were legally erroneous, *Union Oil* reached its conclusion that the claims were invalid by several purported factual determinations as to events in the intervening period: determinations that the claim owners had acquiesced

in the 1931-1932 decisions throughout the intervening period, that the Government and private parties had throughout the period regarded the 1931-1932 decisions as effective and had extensively acted in reliance upon the supposed efficacy of the 1931-1932 decisions as having terminated the claims, that the persons who had so acted would now be prejudiced by any recognition that the 1931-1932 decisions were not effective, and that the claim owners were barred by laches and estoppel from obtaining relief from the concededly erroneous decisions of 1931-1932.

Before any such determinations could properly be made and the claims extinguished, the claim owners were entitled to notice of the charges concerning events during the intervening period, and an opportunity to present evidence and argument to an impartial adjudicatory tribunal. *Union Oil*, however, failed to afford notice or opportunity for a hearing, and failed to afford an impartial tribunal. This failure offended the due process clause, the Administrative Procedure Act, and Interior's own published regulations and decisions concerning adjudications of the validity of mining claims.

The attempted justification in *Union Oil* for denying notice and hearing—that notice and hearing had been afforded prior to the 1931-1932 decisions—has, of course, no logical application to events and charges subsequent to 1932. Quite apart from the substantive questions involved, *Union Oil* is vitiated by fundamental procedural defects, and cannot serve to invalidate respondents' claims.

As shown in the separate brief filed herein by the respondents in the *TOSCO* case, the 1931-1932 decisions are on several alternative grounds subject to reversal in an action for direct judicial review thereof. The respondents here have duly sought such direct review (A. 399, 409), distinct from their request that *Union Oil* be set aside. Accordingly, it is requested that the action of the lower courts

be affirmed, in which event Interior would resume the orderly processing of respondents' patent applications and could not treat the 1931-1932 decisions as presently effective.

ARGUMENT

I.

The *Union Oil* proceeding cannot sustain a decision in the Government's favor since it purported to invalidate valuable property rights on the basis of controverted propositions of fact and of law without affording notice and an opportunity for hearing, thereby offending Due Process, the Administrative Procedure Act, and Interior's own regulations.

When an application for patent for a mining claim is filed in the appropriate local land office, the applicable statutes and regulations, as well as administrative necessities, contemplate that the local officials will examine the application for completeness and formal sufficiency.[14] If the application is defective or incomplete it will be rejected, without prejudice to a new application in proper form, or the applicant will be required to correct or complete it.

The *Union Oil* proceedings, however, did not reject the subject patent applications for any such curable formal deficiency. On the contrary, the applications were rejected on the basis that the underlying mining claims were invalid.[15] And that finding, that the claims were invalid, did

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[14] The contents and filing procedures of patent applications are detailed at length in 30 U.S.C. 28, and 43 C.F.R. Parts 3450, 3470 (1969).

[15] Mining claims are of course property, "property in the fullest sense of that term." *Wilbur* v. *Krushnic,* 280 U.S. 306, 316. That the oil shale deposits within the subject mining claims are valuable is undisputable; indeed, that value provides most of the reason why the Government has gone, and is presently going, to such lengths to establish its proprietary rights thereto.

not rest upon the propriety or sufficiency of any prior adjudication.[16] Rather, *Union Oil* rested upon factual and legal determinations with respect to events subsequent to the "erroneous" adjudications.

Chief among these was the largely factual determination that the claim owners were guilty of laches and estoppel, involving subsidiary determinations that the United States and others had acted in reliance upon the supposed effectiveness of the assessment work decisions and would now be prejudiced, with respect to such actions, by any recognition that those decisions were not to be given effect. In addition, *Union Oil* rested upon the anticipatory rejection of some, but not all, factual propositions that were later to be advanced affirmatively by the claim owners in their offers of proof. For example, the February 1962 decisions made determinations with respect to several remedial administrative actions, rulings and decisions following this Court's ruling in *Virginia-Colorado*.[17] The Solicitor's Office itself acknowledged the presence of disputed factual elements in the *Union Oil* proceedings when, on May 20, 1963, it wrote to counsel for some of the oil shale claimants that their patent applications had been consolidated "with certain others involving identical questions of law and fact."

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[16] On the contrary, the 1964 *Union Oil* opinion conceded that the assessment work decisions against the claims were erroneous in light of this Court's *Virginia-Colorado* decision, and stated that the basic question was "the ultimate effect of an error of law." A. 367. *Union Oil* did reject the legal proposition that Interior lacked statutory authority with respect to assessment work questions.

[17] See, *e.g.*, A. 267. The 1964 *Union Oil* decision made similar determinations on those matters. A. 358-360. The oil shale claim owners contend that these events, and others, established that the Department itself rendered the assessment work decisions ineffective, and the owners introduced a number of documents and deposition testimony in this regard at the trial in the district court below.

It seems indisputable that the essence of an adjudication that satisfies due process is a reasonable opportunity to learn and rebut the arguments and contentions of one's adversary, the presentation of evidence and argument by both sides of a controversy, and a decision of that controversy that is based solely on the argument and evidence presented. As stated in *Morgan* v. *United States,* 304 U.S. 1, 18-19:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Accord, *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 338 ("Due process in such case [determination of the validity of a mining claim] implies notice and a hearing."); *Gonzales* v. *United States,* 348 U.S. 407, 414 ("The petitioner was entitled to know the thrust of the Department's recommendation so he could muster his facts and arguments to meet its contentions."); *Morgan* v. *United States,* 298 U.S. 468, 480 ("There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. . . . The 'hearing' is the hearing of evidence and argument."); *Republic Aviation Corp.* v. *NLRB,* 324 U.S. 793, 799-800; *Ohio Bell Telephone Co.* v. *Public Util. Comm'n,* 301 US. 292; *Crowell* v. *Benson,* 285 U.S. 22, 47-48; *ICC* v. *Louisville & Nashville R.R.,* 227 U.S. 88, 93; Annotation, 99 L.Ed. 460.

The Administrative Procedure Act, an act framed to guard against excesses of administrative zeal and thought

by its draftsmen to impose procedural standards of fairness that exceeded the Constitutional minimums, see *United States* v *Morton Salt Co.*, 338 U.S. 632, 644, also requires, among other things, notice and an opportunity to be heard where the validity of a mining claim is at issue. *E.g.*, *Adams* v. *Witmer*, 271 F.2d 29 (9th Cir. 1958).

Interior's own regulations specifically require that notice of charges and an opportunity to be heard be afforded. *Contest and Protest Proceedings*, 43 C.F.R. Subpart 1852 (1969) (regulations similar in all material respects have been in effect at all relevant times). Interior's published decisions acknowledge that contest proceedings are required to determine the validity of a mining claim. *E.g.*, *United States* v. *O'Leary*, 63 I.D. 341, 345 (1956). Indeed, at the outset of the *Union Oil* proceedings in 1961, the Denver Regional Office of the Solicitor recognized this and so advised the Solicitor's Office. Pl. Ex. 217; A. 240-241.

The February 1962 decisions which rejected the patent applications gave no express reasons for affording neither notice nor opportunity to be heard. As noted at page 9 above, the local officials had been specifically "authorized" by officials in Washington simply to reject the applications, and they did so. The 1964 decision by the Office of the Solicitor, however, stated in effect that notice and an opportunity to be heard need not be given because notice and an opportunity to be heard had been afforded over thirty years before in the assessment work contests themselves. A. 356-358. That notice and opportunity pertained of course only to the matter then alleged, that in or prior to 1931 there had been a default in performance of assessment work. However, that default was not the reason given in *Union Oil* for holding the oil shale claims invalid. Rather, the disputed but vital matters of fact which the 1964 decision purported to determine all occurred subsequent to 1931, matters such as (1) alleged laches and estoppel of the oil shale claim owners up to 1964, (2) supposed

acquiescence by the claim owners, (3) reliance by the Government and private parties on the assessment work decisions throughout the period, and (4) remedial administrative action by Interior in 1935 to apply this Court's decision in *Virginia-Colorado*. *Union Oil's ex parte* decision of these post-1931 factual matters was vital to its conclusion to cancel the claims. Since the matters as to which *Union Oil* denied notice and a hearing were not, and indeed could not have been, covered by the 1931 proceedings, those old proceedings do not warrant that denial. It follows then that *Union Oil* cannot now be affirmed.[18]

The Government's brief does not contend that *Union Oil* was procedurally proper; indeed, the brief scarcely mentions the *Union Oil* proceedings, and endeavors at length to establish the proposition that the old assessment work decisions were rightly decided, a proposition contrary to the recognition in *Union Oil*[19] that they were erroneously

[18] The procedural impropriety of *Union Oil* was compounded by the fact that the Office of the Solicitor not only "authorized" the rejection of the patent applications, ignoring as it did so the Regional Solicitor's indication that the contest procedures calling for notice and hearing should be followed, but also supplied such ammunition of fact and law as was fired against the oil shale claims, as the 1964 opinion in *Union Oil* itself makes clear. No hearing preceded the 1964 opinion; no evidence was offered, no adversary of the oil shale claim owners even participated openly in the "appeals", no brief was filed, no argument made, for the claim owners to rebut. Only the Solicitor's office then could have originated the matters of fact and law asserted in the lengthy 1964 opinion. This combination of prosecutorial and decisional functions ran afoul of established and basic notions of administrative fairness. *E.g., Wong Yang Sung* v. *McGrath*, 339 U.S. 33; *Columbia Research Corp.* v. *Schaffer*, 256 F.2d 677 (2d Cir. 1958) *vacated on other grounds*, 256 F.2d at 680-681; *TransWorld Airlines* v. *CAB*, 254 F.2d 90, 91 (D.C. Cir. 1958); 2 Davis, *Administrative Law* 236, n.2 (1958).

[19] A. 367 ("we have only to determine the ultimate effect of an error of law . . .")

decided. *Cf. Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 94. Its Petition for Certiorari suggests (pp. 6, 9n.4, 13) however that the Government does take the view that *Union Oil* properly ruled on the factual questions discussed above, thereby necessitating the foregoing discussion.

II.

The proceedings in the lower courts provide adequate and appropriate bases for a ruling in the oil shale claimants' favor.

As noted at the outset of this brief, the separate brief being filed on behalf of the respondents in the *TOSCO* case presents alternative arguments common to all four cases warranting a ruling here in favor of the oil shale claim owners. In the interests of brevity those arguments are incorporated by reference and will not be repeated here.

It may bear repeating however that the present cases seek, quite apart from review of *Union Oil*, direct judicial review of the 1931-1932 assessment work decisions themselves (which is all that is sought in the *TOSCO* case). This relief was specifically requested in the oil shale claim owners' complaints. By its answers in the District Court opposing such relief the Government placed in issue factual matters of affirmative defense, specifically asserting laches and estoppel.[20]

After extensive pre-trial discovery conducted by the Government as well as by the claim owners, a full record was compiled at trial. The evidence received at the trial included more than 2,700 pages of documents offered by

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[20] *E.g.*, A. 423.

the Government.[21] The claim owners likewise put in substantial amounts of evidence, comprised entirely of documents in or from Interior's files, answers to interrogatories, or depositions of Government employees. This record is more than adequate, and is entirely appropriate,[22] for decision of the contentions that are set out in the respondents' brief in the *TOSCO* case.

On the other hand, a brief comparison of the trial record with the purported factual determinations in *Union Oil* will make clear the impossibility of treating that as an adequate adjudication. For example, the *Union Oil* proceedings purported to find that the claim owners had "acquiesced" in the old decisions (A. 267, 363, 369), but Judge Doyle found after trial that "there is a dearth of evidence to establish acquiescence, express or implied. . . ." (A. 47)

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[21] The Clerk of the District Court separately paginated 2,772 pages of the Government's evidence. He did not paginate a number of the Government's documents as "not suitable for reproduction."

[22] The implications in the Government's Reply to the Brief in Opposition to the grant of certiorari (pp. 2-3) that there was a "record" made in *Union Oil*, and that that record was appropriate for the findings *Union Oil* made, are insupportable. The Reply's disparagement of "the record sought to be made in the district court" (pp. 2-3) and its argument that the courts may not themselves decide whether the affirmative defense of laches has been sustained (p. 3 n. 1), may be understandable in that the district court was the only forum in which an evidentiary record was made, that record was quite full, and that record not only showed that there was no evidence of laches but affirmatively disproved laches. Of course the Secretary as defendant is not to be the judge of his own affirmative defense, whether laches or estoppel, for that would preclude judicial review of the old assessment work decisions; the courts themselves decide whether resort to them has been timely. *E.g., Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206; *Costello* v. *United States*, 365 U.S. 265; *Gardner* v. *Panama R. Co.*, 342 U.S. 29; *Holmberg* v. *Armbrecht, et al.*, 327 U.S. 392; *Powell* v. *Zuckert*, 366 F.2d 634 (D.C. Cir. 1966); *Kosty* v. *Lewis*, 319 F.2d 744 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964.

and indeed the Government has not even contested that finding in its subsequent appeals.

Similarly, *Union Oil* purported to find that the United States and others had relied upon the supposed effectiveness of the old assessment work decisions and that the claim owners were guilty of laches and estoppel. A. 368, 370-373. But during the pre-trial discovery proceedings (A. 305-312) and in its post-trial brief (pp. 59-60), the Government conceded that there was no evidence whatsoever of any such reliance.[23] The concession was hardly gratuitous; the trial record was replete with documentary evidence showing that the Government had regarded the assessment work decisions as void. *E.g.*, Pl. Ex. 176; A. 195-196 (Interior letter in 1935 to the Secretary of the Navy stating that the assessment work decision against the Oyler claims was "without effect and void.")[24]

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[23] The Petition for Certiorari, however, reasserts such reliance (p. 11), but of course cites no evidence. The same passage recurs in the Government's brief on the merits (pp. 42-43), but with the significant omission of the phrase "in reliance on the cancellations."

[24] For a third and more specific example, we note that the Lucy Agnes claims 1 and 2 were among those (see Supplemental Decision, 72 I.D. 313 (1965)) as to which *Union Oil* found "acquiescence" for 30 years on the part of the claim owners, and reliance by the Government on the assessment work decision. *Union Oil* also criticized the claim owners for not seeking judicial relief "within a reasonable time" after this Court's ruling in *Virginia-Colorado* in 1935. A. 368. The record at trial showed, however, that within the following year the owners of the Lucy Agnes claims had inquired of the General Land Office as to the prior assessment work decisions, noting that the *Virginia-Colorado* ruling had "seemingly set at naught all of these former challenges." Pl. Ex. 181; A. 200. The Commissioner of the General Land Office responded that "this office considers it would be unnecessary to revoke its previous decision holding the Lucy Agnes claims to be null and void. That decision being without authority of law is without any effect on the

CONCLUSION

The principal thrust of this brief has been a negative one—that the *Union Oil* proceedings were riddled with substantial procedural defects. This brief has been necessitated by the Government's occasional intimations that it contends that *Union Oil* was both procedurally and substantively proper. Respondents trust however that it will prove unnecessary for this Court or a lower court to rule upon these contentions. As demonstrated in the separate brief, incorporated by reference herein, filed on behalf of The Oil Shale Corporation, there are several alternative grounds upon which a suit for direct judicial review of the old assessment work decisions should prevail. These are such suits. Respondents are confident that, upon prevailing in their direct challenge of the 1931-1932 decisions, they will as a practical matter no longer be faced with *Union Oil* as a barrier to the orderly processing of their patent applications, applications which have now been

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title arising from the location of the claims." Pl. Ex. 180; A. 199-200. *Union Oil's* findings of acquiescence, laches and estoppel on the part of the owners of the Lucy Agnes claims 1 and 2, and of reliance by the United States and others upon the supposed effectiveness of the assessment work decision against the claims, is all the more startling in view of the fact that the two letters quoted were among six documents that were appended to the oil shale claimants' briefs in *Union Oil* calling Interior's attention to what its long practice had actually been and illustrative of evidence that could be produced at a hearing. A. 370, 380-382.

pending for 11 and 15 years, respectively. The decision below should be affirmed.

Respectfully submitted,

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January 1970